

**PUBLIC INTEGRITY COMMISSION
MINUTES
February 19, 2019
10:00 A.M.**

1. Call to Order: 10:08. Present: Bonnie Smith (Chair); William F. Tobin, Jr. (Vice-Chair), Michele Whetzel (Vice-Chair); Commissioner Manus; Commission Counsel, Deborah J. Moreau, Esq.

2. Approval of Minutes for December 18, 2018. Moved—Commissioner Tobin; seconded—Commissioner Manus. Vote 4-0, approved.

3. Administrative Items

A. Officer elections. Motion to keep the same officers for another year. Moved—Commissioner Tobin; seconded Commissioner Manus. Vote 4-0, approved.

B. The Delaware Supreme Court made a decision on the briefs in the *Abbott v. PIC* matter on February 19, 2019. The court sat *en banc* (all five Justices).

4. Motion to go into Executive Sessionⁱ and Hear Requests for Advisory Opinions, Waivers and Referrals: Moved—Commissioner Whetzel; seconded—Commissioner Smith. Vote 4-0, approved.

A. PIC was served a subpoena for all records related to an alleged request from the Commission. The Commission had no records related to such request.

B. Two individuals were referred to the Attorney General's Office for consideration of prosecution and/or fines for breaching the confidentiality provisions in the Code of Conduct. All parties were made aware that the confidentiality provision could be unconstitutional with citations to applicable case law.

Update: The Attorney General's office decided that the confidentiality portion of our statute is likely unconstitutional and declined prosecution. Letters were sent to two individuals advising them of same.

5. 18-27B—Private Interest (review)

[Employee] had asked for, and received, an advisory opinion in August 2018. After the opinion was issued, PIC was contacted by a supervisor in a different division of the Employee's State agency. [The Supervisor] was concerned that [Employee] had misrepresented the facts to the Commission in August 2018. After discussion with Commission Counsel, [Supervisor] agreed to meet with the Commission to discuss her concerns. [Employee] was advised that she would need to re-appear before the Commission to review her prior advisory opinion. [Supervisor] was scheduled to meet with the Commission separately from [Employee]. [Supervisor] was accompanied by [her boss].

[The Supervisor] started out by explaining that the [business Employee] intended to purchase had never closed during the time [Employee] was awaiting the Commission's advisory opinion. That information conflicted with [Employee]'s statements at the August 2018 hearing that if she was not granted [permission to proceed with the purchase of the business] that the facility would close, employees would be unemployed and [the clients] would be displaced. In fact, [the Supervisor] stated that parents and staff had no idea that the [business] might be sold during the time [Employee] was engaged in negotiations to potentially buy the facility.

[The Supervisor] stated that [Employee]'s state employment would allow her to access confidential information about other [similar businesses] in the State through a database. Some of the information in the database was available to the public but it also contained information about anonymous sources who have reported [business] violations to the State. Another concern raised was that the [State office that regulated the business] was only open during [Employee]'s work hours. [The Supervisor] questioned how [Employee] would address issues about the [business] without using her State work hours to do so. Lastly, [the Supervisor] pointed out that the Merit Rules have language that would prohibit [Employee]'s ownership of a [business].

The Commission stressed to [the Supervisor] that if the agency did not want their employees to work at, or own, businesses regulated by their agency that they could draft a policy prohibiting such activity. The policies and procedures of each agency may be more strict than the Code of Conduct but not less strict. [The Supervisor's boss] asked Commission Counsel to provide contact information for agencies that had drafted such policies.

[Supervisor and her boss] were excused and the Commission met with [Employee] later in the day.

*****The Commission met separately with [Employee]*****

The Commission asked [Employee] about her previous comments during the August 2018, meeting regarding the fact that the [business] was on the verge of closing and that employees would be out of work and [clients] would be displaced if she was not approved to purchase the [business]. [Employee] denied making such comments. She also denied the fact that the database would give her access to confidential information not available to the general public. [Employee] stated she still wanted to purchase the [business] (which actually closed on January 17th) and her sister would put her name on the [official records].

18-27A Motion--The Commission decided to withdraw [Employee]'s previous advisory opinion (now referred to as 27A). Moved—Commissioner Tobin; seconded—Commissioner Manus. Vote 4-0, approved.

18-27B Motion—[Employee]'s ownership or co-ownership of the [business] would create a conflict of interest with her State position. Moved—Commissioner Whetzel; seconded—Commissioner Tobin. Vote 4-0, approved.

6. 19-01—Dual Compensation

[Employee] ran for and was elected [to public office] in November 2018. He was also a State employee. His State work hours were usually 8:00 a.m. to 4:30 p.m. The hours of [the public office] listed on their website were 8:00 a.m. to 5:00 p.m. [Employee's State Supervisor]

questioned how it would be possible for [Employee] to work two government positions, with the same work hours, without violating the State Dual Compensation policy. 29 Del. C. § 5822. The policy prohibited an employee from being paid by two government entities for the same hour of work. The statute also required those employees who were dually employed to keep time records which illustrated the hours worked at their State job(s) so that the State auditors could confirm that there had not been dual payment for any work hour. *Id.*

29 Del. C. § 5822 reads:

(a) Any person employed by the State, or by any political subdivision of the State, including but not limited to any county, city or municipality, who also serves in an elected or paid appointed position in state government or in the government of any political subdivision of the State, including but not limited to any county, city or municipality, shall have his or her pay reduced on a prorated basis for any hours or days missed during the course of the employee's normal workday or during the course of the employee's normal workweek while serving in an elected or paid appointed position which requires the employee to miss any time which is normally required of other employees in the same or similar positions.

(b) Any day an employee misses work due to his or her elected or paid appointed position, he or she shall have his or her immediate supervisor verify a time record stating specifically the number of hours worked that day; said verification to take place at least once every pay period.

(c) All time records, so verified, shall be kept by the immediate supervisor until such time as they are required by the State Auditor.

(e) Any hours or days during which an employee uses vacation, personal, or compensatory days to which he or she is entitled shall not constitute hours or days which fall within the scope of this subchapter.

Absent a conflict of interest, the law recognized that one employee may hold two government positions. However, such a situation required rules of its own. The employee could not be paid for one hour of work by two entities. Therefore, the dually employed person must take vacation, personal or compensatory time from one position or have their salary prorated to reflect the missed time. Because the hours for the [State] position and the [public office] overlapped, [Employee] was required to take vacation, personal or compensatory time from one position while working at the other position. Should [Employee] have neither vacation, personal or compensatory time available, he must have his pay prorated to reflect a reduced salary for the lost time. 29 Del. C. § 5822(e).

The statute also contained language which controlled how vacation, compensatory, and personal time should be tracked. If the work hours coincided for the first and second jobs, and the employee used vacation or compensatory time so that they could be paid by both entities, the law mandated two requirements: (1) time records be kept and (2) time records be verified by supervisors "at least once every pay period." 29 Del. C. 5822(b).

To comply with the statutes reporting requirements [Employee], [his attorney],

[Employee's State Supervisor] and [the agency's Deputy Attorney General] worked together to create a document that required [Employee] to certify his work hours at [his State job] once every pay period. At the meeting [Employee] provided a copy of the document and discussed the fact that the [State agency] would try to accommodate his requests for vacation or personal time when possible. [Employee] acknowledged his understanding of the fact that [his State agency] would try, but may not be able, to grant all of his requests. [Employee] also demonstrated his knowledge of the statute's requirements and the underlying public policy.

The Commission's oversight powers of the Dual Compensation Policy are to ensure that those employees who have been identified as working two government jobs have appropriate forms and policies in place so that accurate time records can be kept. [Employee] fulfilled that requirement.

Motion—The parties complied with the statutory requirements regarding dual compensation.

Moved—Commissioner Manus; seconded—Commissioner Tobin. Vote 4-0, approved.

7. 19-02—Personal Interest

[Employee] was unable to attend due to illness. The Commission attempted to resolve his matter in his absence but was unable to gather all the relevant facts without [Employee]'s input. The Commission decided to ask [Employee] to reschedule for the next meeting because they wanted to ask him additional questions.

8. 18-50—Outside Employment

[Employee] is employed part-time by [a State agency]. [The agency] provides services to [clients] diagnosed with [specific disorders]. Individuals diagnosed with [those disorders] can receive treatment that addresses all of their needs. [The agency] operates a facility which provides treatment to [a specific type of client]. [Employee] is the Director [of that facility and works with the clients].

[Employee] also worked part-time [training others in the care of client's at a private facility]. He developed and implemented the curriculum for [those undergoing training]. While [client] treatment was not part of his primary job duties, he occasionally worked some hours [if there was an urgent need].

[Employee] worked a third part-time job at a small private [business], one or two evenings a week. His work at the private [business] afforded him the opportunity to enhance his skills by working with [clients with a different background than that of his State clients]. [Employee] would not work with a client that he had previously had contact with at [his State agency] and vice-versa.

Lastly, [Employee] performed some private consulting work in [his area of expertise] but he did not work on cases involving Delaware or its citizens. For all of his part-time roles, [Employee] was careful not to use State time and resources while working on his private endeavors. He asked the Commission to consider whether any of his private part-time work created a conflict of interest with his State position.

A. Under 29 Del. C. § 5806(b), State employees may not accept other employment if acceptance may result in:

(1) impaired judgment in performing official duties:

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). [Employee] did not treat clients that he encountered in one job that he had also had contact with in one of his other capacities. He recognized that not only would it be a breach of the Code of Conduct, it also violated [his profession's] ethics rules. Therefore, he was keenly aware of the need to recuse when necessary and the required procedural steps to accomplish such recusal.

(2) preferential treatment to any person:

The next concern addressed by the statute is to insure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. [The performance of his job duties] was necessarily a one-on-one endeavor. It was difficult to see how [Employee] could use his multiple roles to gain an advantage or to show preferential treatment to any person.

(3) official decisions outside official channels:

There were no facts to suggest that [Employee] would make official decisions outside official channels. That was not to say he would do so, he was entitled to a strong presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

(4) any adverse effect on the public's confidence in the integrity of its government:

The purpose of the code is to insure that there is not only no actual violation, but also not even a "justifiable impression" of a violation, 29 Del. C. § 5802, the Commission treats this provision as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the State duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997).

[Employee]'s multiple endeavors included [clients] from multiple, and separate, demographics. In his State position, [Employee actually worked with clients]. When working at the [private facility], he was primarily [training co-workers], not clients. If the need arose for [Employee] to actually have contact with a patient it was very unlikely the [client] would be someone from [he knew from his State position]. The same applied to the [clients] he saw in [the private business]. As to his consulting work, [Employee] only worked on cases involving out-of-state individuals, practically eliminating the potential for any crossover.

In deciding if the conduct would raise the appearance of impropriety, the Commission also considers whether the outside employment would be contrary to the restrictions on misuse of public office. 29 Del. C. § 5806(e). One prohibition considered by the Commission under that provision is the State employee may not use State time or State resources (i.e. computer, fax, phone, etc.) to work on the private business. [Employee] stated in his letter that he was very

careful to keep complete time records and did not use his State time or resources for his private endeavors.

Motion—[Employee]’s part-time positions did not create a conflict of interest with his State position. Moved—Commissioner Manus; seconded—Commissioner Whetzel. Vote 4-0, approved.

9. 18-06—Private Interest

[Employee] had been a casual/seasonal worker for the [State] since 2012. [Employee] helped clients with their daily activities and provided mentoring]. [Employee]’s work hours were Monday-Thursday from 8:15 a.m. to 4:45 p.m. and Fridays 8:15 a.m. to 1:45 p.m.

[Employee] applied for and was awarded a Request for Proposal (RFP) to oversee [a project that was being implemented at his State work location]. [The work was not related to his State job duties]. [Employee] and his wife formed an organization and responded to the RFP, which he was awarded. [Employee] asked the Commission to determine if the contract work would create a conflict of interest with his State job duties. If so, he requested a waiver.

1. In their official capacity, employees may not review or dispose of matters if they have a personal or private interest in a matter before them. 29 Del. C. § 5805(a)(1).

A personal or private interest in a matter is an interest which tends to impair a person’s independence of judgment in the performance of the person’s duties with respect to that matter.” 29 Del. C. § 5805(a)(1). As a matter of law, a person has a personal or private interest if any decision “with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent” than others similarly situated or if “the person or a close relative has a financial interest in a private enterprise which would be affected” by a decision on the matter to a greater or lesser degree than others similarly situated. 29 Del. C. § 5805(a)(2)(a) and (b). A personal or private interest is not limited to narrow definitions such as “close relatives” and “financial interest.” 29 Del. C. § 5805(a)(2). Rather, it recognizes that a State official can have a “personal or private interest” outside those limited parameters. It is a codification of the common law restriction on government officials. See, e.g., *Commission Op. Nos. 00-04 and 00-18*. When there is a personal or private interest, the official is to recuse from the outset and even neutral and unbiased statements are prohibited. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff’d*, No. 304 (Del., January 29, 1996).

[As part of his State job duties, Employee worked directly with clients]. The [project] would be open to members of the public and other State employees. Any clients who wanted to participate in the project would need to be attended by a staff member]. [Employee] stated that he would not [be tasked with attending to clients who were involved in the project]. Upon arrival at the [project, clients and their attendants] would make contact with [his wife]. As a result, it was difficult for the Commission to see how [Employee] would have an opportunity to make decisions about the [project] while performing his State job duties or vice versa.

2. Employees may not engage in conduct that may raise suspicion among the public that they are engaging in conduct contrary to the public trust. 29 Del. C. § 5806(a).

The purpose of the code is to insure that there is not only no actual violation, but also not even a “justifiable impression” of a violation. 29 Del. C. § 5802. The Commission treats that as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the official's duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). Thus, in deciding appearance of impropriety issues, the Commission looks at the totality of the circumstances. See, e.g., *Commission Op. No. 97-23* and *97-42*. Those circumstances should be examined within the framework of the Code's purpose which is to achieve a balance between a “justifiable impression” that the Code is being violated by an official, while not “unduly circumscribing” their conduct so that citizens are encouraged to assume public office and employment. 29 Del. C. §§ 5802(1) and 5802(3).

[Employee] would work at the [project] outside of his State work hours. In addition, there was no connection between his State job duties and his duties [related to the project], other than [it being located at the same location as his State job]. As a consequence, it was unlikely that [Employee]'s work [on the project] would create a justifiable impression of a conflict of interest amongst the public.

Motion—No conflict. Moved—Commissioner Whetzel; seconded—Commissioner Tobin. Vote 4-0, approved.

10. Motion to go out of Executive Session: Moved—Commissioner Whetzel, seconded—Commissioner Smith. Vote 4-0, approved.

****Applicant showed up 15 minutes late****

11. Motion to go back into Executive Session: Moved—Commissioner Manus; seconded Commissioner Tobin. Vote 4-0, approved.

12. 19-03—Outside Employment

[Employee] was a Supervisor [at a State agency]. She oversaw employees who provided services directly to clients]. In her oversight role, [Employee] was responsible for planning, assigning, reviewing, evaluating, coaching, training and disciplining other [employees]. She also monitored case management plans implemented by her subordinates.

[Employee] also worked part-time for [a municipality as a member of their recreation personnel]. Her work hours were usually 5:30 to 8:30 and did not conflict with her State work hours. She monitored youth and adults who used the gymnasium where she was assigned to play basketball and other recreational activities. She also worked at the scoring table for the youth basketball league. Police officers were also assigned to the recreation locations to handle any issues that could arise. At some of the events [Employee] occasionally saw [clients that were assigned to her subordinates]. While [Employee] may have known the [clients] by sight, they generally did not know her.

[Employee] asked the Commission if her part-time work created a conflict of interest with her State job duties.

A. Under 29 Del. C. § 5806(b), State employees may not accept other employment if acceptance may result in:

(1) impaired judgment in performing official duties:

To avoid impaired judgment in performing official duties, State employees may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). [Employee] did not have direct oversight over individual clients and was only involved in their matters if one of her subordinates sought her advice. At the meeting, she explained that the [people she encountered as a recreation personnel] were from a different geographic area than the [clients] that were assigned to her subordinates. As a result, it was extremely unlikely that she would encounter a [client] at the recreation facility that she also made decisions about in her State job.

(2) preferential treatment to any person:

The next concern addressed by the statute is to insure co-workers and colleagues are not placed in a position to make decisions that may result in preferential treatment to any person. At her part-time job, [Employee] worked with [a different group of people than those she encountered in her State job]. It was difficult to see how she would encounter a co-worker or colleague who could benefit in some way from her part-time job duties.

(3) official decisions outside official channels:

There were no facts to suggest that [Employee] would make official decisions outside official channels. That was not to say she would do so, she was entitled to a strong presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd.*, No. 304 (Del., January 29, 1996).

(4) any adverse effect on the public's confidence in the integrity of its government:

The purpose of the code is to insure that there is not only no actual violation, but also not even a "justifiable impression" of a violation, 29 Del. C. § 5802, the Commission treats this provision as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the State duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997).

It was unlikely that [Employee]'s dual roles would create an appearance of impropriety amongst the public. She worked in two separate geographic areas and the people that attended the recreation center were unlikely to be [a client of her subordinates].

In deciding if the conduct would raise the appearance of impropriety, the Commission also considered whether the outside employment would be contrary to the restrictions on misuse of public office. 29 Del. C. § 5806(e). One prohibition considered by the Commission

under that provision was that the State employee may not use State time or State resources (i.e. computer, fax, phone, etc.) to work on the private business. [Employee] worked at her part-time job] outside of her State work hours.

Motion: No conflict. Moved—Commissioner Whetzel; seconded—Commissioner Tobin. Vote 4-0, approved.

13. Motion to go out of Executive Session: Moved—Commissioner Whetzel, seconded—Commissioner Smith. Vote 4-0, approved.

14. Adjournment

ⁱ Pursuant to 29 Del. C. § 10004(6) to discuss non-public records (29 Del. C. § 10002(6) Any records specifically exempted from public disclosure by statute or common law), as the written statements required for advisory opinions and complaints are subject to the confidentiality standards in 29 Del. C. § 5805(f), 29 Del. C. § 5807(d) Advisory Opinion Requests, and 29 Del. C. § 5810(h) for Complaints. Further, the proceedings, like personnel actions are, by statute, closed unless the applicant for the advisory opinion requests a public meeting, 29 Del. C. § 5805(f), 29 Del. C. § 5807(d), or the person charged in a complaint requests a public meeting. 29 Del. C. § 5810(h). No applicant for an advisory opinion, nor a person charged by a complaint has requested an open meeting.